IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3230 OF 2004

M/s.Elder Pharmaceuticals Ltd.
and another. ... Petitioners

Vs.

Municipal Corporation of
Greater Mumbai & Ors. ... Respondents

Jimmy Pochakhanwala with Mr.Anand Kumar
for the petitioners

A.N.Shaikh for the respondents

CORAM : V.C. DAGA, J.

DATED : 6th February 2007.

JUDGMENT:

1. The present petition is filed by the petitioner, *inter alia*; seeking a writ of certiorari for setting aside the order dated 22nd October, 2003. By the said order, the respondent corporation has sought to levy octroi duty on an item known as "TANTUM GEL" under Item 59 of Schedule H of the Mumbai Municipal Corporation Act, 1988 ("Act" for short). The petitioners are also seeking a refund of octroi collected by the respondent corporation in respect of the consignment of the said goods. Some of the material facts of the present case are as under:

2. The petitioner No.1 is in the business of

medical and pharmaceutical preparations and has factory at Navi Mumbai. The respondent No.1 is a Municipal Corporation which has framed Octroi Rules for levy of an octroi in respect of items, which are entering within the territorial limit of City of Mumbai under the provisions of the Act. It is the case of the petitioners that the petitioners prepared medicinal preparation under the trade mark "TANTUM". One of the drugs manufactured is "TANTUM GEL". It is the case of the petitioners that the product which is manufactured by the petitioners is a medicinal formulation and sold as Tantum cream, oral rinse, vaginal douche and gel. It sold in the market as medicine only as an external application in the case of acute musculo-skeletal disorders or acue thrombophebitis. It is also the case of the petitioners that the said medicine "TANTUM GEL" is a formulation of 5% Benzydamine Gel and is used only for imflammation therapy.

3. It is the case of the petitioners that without any prior notice, the respondents have levied octroi duty on the said TANTUM GEL @ 5.5% under Item 59 of Shedule H of the Act and the petitioners were compelled to make payment of octroi amounting to Rs.4,953/-, which the petitioners paid under protest.

4. Under the provisions of Act the items which fall under schedule H are levied with the octroi duty and are thus, liable to payment thereof whereas items which are falling under Schedule H-1 are free from the payment of octroi duty. It is the case of the petitioners that the said TANTUM GEL being pharmaceutical preparation prepared as a medicine under the Drug Licence issued by the Food and Drug Authority is exempt from octroi as per Schedule H-1 of the Act.

5. However, the respondent corporation has assessed the said goods under the residuary entry under Item 59 of Schedule H of the Act. On the basis of the aforesaid octroi duty has been assessed @ 5.5%

6. The learned counsel for the petitioners has contended that there is no dispute in the present case that the petitioners are manufacturing the said product as a medicine and it is sold in the market as a medicine. The said goods are sold as medicine only as an external application in the case of acute musculo-skeletal disorders or acute thrombophebitis. The carton which has been produced also mentions that it is for external use only.

7. Apart from the aforesaid, there is no dispute that the petitioners are holding manufacturing licence under Foods and Drugs Act and thus, the said item which is manufactured by petitioners is an item specified as a medicine under Food and Drugs Act. It is also not in dispute that the goods which are produced by the petitioners under the said licence are sold in the market as a medicine. The learned counsel has further contended that the respondent- corporation knowing fully well that the same are medicines and are sold in the market as medicines still has sought to classify the said item illegally as residuary item under item 59 of Schedule H.

8. The learned counsel for the petitioners has relied upon the judgment of the learned single Judge of this court in the case of **Proctor and Gamble India Ltd. Vs. The Municipal Corporation of Greater Bombay and Ors**., 2004(1) ALL MR 425 and submitted that the burden of proving that the said goods fall under any of the entry of Schedule- H of the Act and, as such, liable to an assessment for payment of octroi duty is on the Corporation.

9. In the present case, there is no material produced of any nature whatsoever nor even it is the case of the Corporation that this particular product falls within a particular item because the Corporation itself is seeking to assess the said item under the residuary heading of item 59 of schedule H.

10. The learned counsel for the petitioners has thereafter relied on paras-4 and 5 of the said judgment and contended that once goods are produced as a drug under the licence issued by the Foods and Drugs Authorities then it is not open for the Corporation to contend that the said goods are not medicines and are liable to be assessed as residuary article under item 59 of the schedule H.

11. The learned counsel for the petitioners drew my attention to the judgment of the Division Bench in Appeal No.916 of 1993, decided on 9th August 1994 in which it has been, *inter alia*; held once again that the burden of proving that a particular item falls under particular heading of Schedule- H of the Act is that of the department because tax statute has to be strictly construed and in absence of discharge of the

said burden, it is not open for the department to levy any tax and/or octroi duty on any of the items which are brought in within the territorial limits of Mumbai by the petitioners.

12. The learned counsel for the petitioners has also relied upon the Division Bench judgment to the effect that once the goods are manufactured under the Drug Licence then all such drug preparations are to be treated as medicines and thus, they are entitled to benefit of exemption under item 36 of Schedule H-1 of the Act. It is therefore submitted that the impugned order passed by the authorities dated 22nd October, 2003 is illegal, unlawful and liable to be quashed and set aside. The petitioners are entitled to refund of amount wrongfully collected by the respondents towards the octroi duty.

13. On the other hand, the learned counsel for the Corporation has placed reliance on the averments made in affidavit in reply to the said petition. He has raised a preliminary objection to the tenability of the petition in view of the availability of alternate remedy of appeal and went on to contend on merits that it is for the petitioners to prove that the said item

falls under the category of medicine and that the petitioners have failed to discharge the said burden. It has been further submitted that in any event there is an alternate remedy available under the Act and therefore the present petition should not be allowed.

14. The learned counsel for the respondents, however, could not indicate under which particular entry of Schedule- H the said goods can be classified for the purpose of levy of octroi duty. He has fairly conceded that there is no material on record to establish that the subject item falls under any particular heading of schedule H. He has submitted that it is because of the same that the Corporation has relied upon residual entry, viz., item 59 of Schedule H.

15. I have considered the rival contentions. I am of the opinion that there is no substance in the contention of the learned counsel for the respondents.

16. Dealing with the first contention that there is an alternate remedy available of an appeal under the rules. It is now well settled that the appeal cannot be a fetter on the power of the writ court to

exercise writ jurisdiction. It is only a matter of discretion. It is also well settled that the court normally at the final hearing of the writ petition, once it is admitted, would not dismiss the petition only on the ground of availability of alternate remedy unless in the view of the court it is necessary that the party must be relegated to appeal to determine any aspect of fact. There is no such case made out in the present case. In that view of the matter, I do not propose to accept the contention that the petition should be dismissed on the ground of alternate remedy.

17. Now turning to the second contention of the respondents that the petitioners have failed to prove that the said item is a medicine, I am of the view that the contention runs counter to the two judgments of this court ie. judgment of the learned single judge in the case of **Procter and Gamble India Ltd. Vs. The Municipal Corporation of Greater Bombay** (Supra) and the judgment of the Division Bench in the case of the **Municipal Corporation of Greater Bombay and Ors. Vs. Procter & Gamble India Ltd and Anr.** (supra) in which it has been held that it is for the authority, who is seeking to levy tax, to discharge its burden to establish that the goods fall under any

particular heading and, thus, liable to be assessed for payment of octroi duty. In that view of the matter, the submission made by the learned counsel for the respondents is required to be rejected.

18. On the aforesaid facts of the present case, it is clear that no material of any nature whatsoever is produced by the respondent corporation to arrive at a conclusion that the said item is not a medicine.

19. In the light of the aforesaid, I am of the opinion, that the present petition must succeed on the basis of the available material. However, it is made clear that this judgment shall not come in the way of the respondent- corporation to take proper view of the matter for future entry or import of goods in the Corporation limit on fresh material subject to following principles of natural justice.

20. Petition is allowed. Rule is made absolute in terms of prayer clauses (a) to (c) with no order as to costs.

(V.C.DAGA, J.)